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**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503**

November 20, 1987

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

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SUBJECT: Department of Justice draft report on H.R. 1212 as passed by the House, the Employee Polygraph Protection Act.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

NOVEMBER 24, 1987

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

[Signature]
James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: A.B. Culvahouse, Jr.
Bob Damus
Karen Wilson

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Honorable Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter sets forth the views of the Department of Justice on H.R. 1212, the Employee Polygraph Protection Act.

The Department of Justice strongly opposes enactment of this bill. On March 5, 1987, Assistant Attorney General Stephen J. Markman testified before the Employment Opportunities Subcommittee of the House Education and Labor Committee concerning H.R. 1212. At that time, he expressed the Department's opposition to the bill, and the reasons for this opposition. A copy of his testimony is attached.

In brief, H.R. 1212 violates the Administration's free market principles. The terms and conditions of private employment generally should be decided in the private marketplace, without unnecessary interference by the federal government. Absent some proof of impermissible discrimination, the Department of Justice knows of no compelling reason why the federal government in particular should interfere with an employer's judgment, or the techniques he or she uses to reach that judgment, on the credibility of employees or prospective employees.

While the regulatory scheme proposed by H.R. 1212 is no doubt premised on the desire to ensure accurate polygraph test results, accuracy is something that most employers, employees (the great bulk of whom are no doubt seeking to tell the truth), and polygraph examiners have every incentive to try to ensure of their own accord. From an economic perspective it seems highly unreasonable to believe that employers would incur the cost of \$50-60 per test, and risk generating bad will among valuable or potentially valuable employees and thus perhaps losing them to competitors, without taking cost-effective measures to ensure the most accurate results. Certainly, the market is more expert than

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the federal government in knowing how to ensure accurate results most efficiently.

In addition, assuming that polygraphs are abused by private employers (certainly, such abuse is possible) and that some government regulation of polygraphs is required, such regulation should take place at the state rather than the federal level. 1/ Important principles of federalism require us to oppose federal government intervention in matters that traditionally have been the responsibility of the states where there is no evidence of an overriding need for national policy uniformity. Until now, regulating polygraph use has been the responsibility of the states; in fact, at least thirty-four states and the District of Columbia have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners. It is the states that are charged with protecting the health, safety, and welfare of their citizens. They uniquely possess the resources and competence to discern the conditions, needs, and desires of their citizens on these issues and to enact laws to address those concerns. 2/ To preempt the states in this context would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

Polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue that requires careful balancing of the interests of consumers, employees, and employers, making it precisely the type of issue in which a diversity of responses, providing alternative solutions to differing situations and ensuring the ability to experiment with various approaches, is particularly appropriate. Possible responses range from relying on the free market, to

1/ To the extent that supporters of federal polygraph regulation rely upon the supposed phenomenon of intra-company reassignments of employees to states with lax polygraph regulations in order to avoid polygraph regulations in other states, that perceived problem -- if it exists at all -- could be dealt with through far more narrowly tailored legislation to prohibit such tactics when used for the purpose of avoiding the laws of the state in which employees are regularly assigned.

2/ To illustrate by example, there may be states in which fidelity bond premiums for employees in trusted positions are kept low because underwriters are permitted to use polygraph analysis. Such states could decide that their overall needs would best be served by continuing to permit polygraph use in such circumstances; states should be left free to take an essentially local condition such as this into account in regulating polygraph use.

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licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to curtail the vigorous debate on the issue continuing to take place within the states.

While the bill as reported by the full committee and passed by the House of Representatives contains exceptions for certain industries, it does nothing to respond to our fundamental concerns regarding federalism and the free market. The Department of Justice recommends against enactment of this legislation, and will recommend a veto should it be approved by the full Congress.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John R. Bolton
Assistant Attorney General